

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
ASSIGNED TO WESTERN SECTION ON BRIEFS MARCH 30, 2007

**WILLIAM W. YORK v. TENNESSEE BOARD OF PROBATION AND
PAROLE**

**Direct Appeal from the Chancery Court for Davidson County
No. 01-3349-1 Claudia Bonnyman, Chancellor**

No. M2005-01488-COA-R3-CV - Filed on May 25, 2007

In 2001, the appellant, a pro se prisoner, petitioned the chancery court for a writ of certiorari regarding the parole board's decision denying him parole and setting a date for his next parole hearing ten years later. The chancery court granted the parole board's motion to dismiss the petition, and the prisoner appealed. This Court affirmed the chancery court's decision to dismiss the petition insofar as the prisoner alleged error with the decision to deny parole, but reversed and remanded as to the decision to defer parole consideration for ten years, finding it arbitrary. On remand, the chancery court ordered a second parole hearing, but later vacated the order. However, a second hearing had already been held at which the parole board again denied parole and set a date for the next parole hearing six years from the date of this second hearing. The chancery court ruled that the decision of the parole board to defer parole consideration for six years was not arbitrary, and concluded that the prisoner had been granted the relief to which he was entitled, dismissing the petition. The prisoner timely appealed to this Court. We affirm, as modified.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed as
Modified**

ALAN E. HIGHERS, J., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

William W. York, Mountain City, TN, *pro se*

Paul G. Summers, Attorney General & Reporter; Michael E. Moore, Solicitor General; Mark A. Hudson, Senior Counsel, Nashville, TN, for Appellee

OPINION

I. FACTS AND PROCEDURAL HISTORY

This is the second appeal brought by this incarcerated pro se litigant regarding the denial of his parole and the setting of a date for future parole consideration. Appellant, William W. York (“Mr. York”), is an inmate in custody of the Tennessee Department of Corrections at the Northeast Correctional Complex at Mountain City, Tennessee. Mr. York is serving two life sentences for two first degree murder convictions with sentences imposed in 1978. Mr. York first became eligible for parole consideration in July of 2001. After a hearing at that time, the Tennessee Board of Probation and Parole (“Appellee” or “the Board”) denied Mr. York parole and deferred further parole review until July of 2011, ten years later. Mr. York filed a petition for writ of certiorari in the Davidson County Chancery Court, but the court granted the Board’s motion to dismiss. This Court, in *York v. Tennessee Board of Probation & Parole*, No. M2003-00822-COA-R3-CV, 2004 WL 305791 (Tenn. Ct. App. Feb. 17, 2004), affirmed in part, and reversed in part. We affirmed the Board’s decision to deny parole based upon Tenn. Code Ann. § 40-35-503(b)(2), which provides: “Release on parole is a privilege and not a right, and no inmate convicted shall be granted parole if the board finds that . . . (2) The release from custody at the time would depreciate the seriousness of the crime of which the defendant stands convicted or promote disrespect for the law[.]” However, we found that the Board’s decision to defer Appellant’s next parole hearing for ten years was arbitrary, reversed this aspect of the decision, and remanded to the chancery court for further proceedings.

On remand, the chancery court entered an order on November 2, 2004, directing the Board to hold “a parole hearing that will establish a deferral date meeting the guidelines provided by the Court of Appeals” and the decision of *Baldwin v. Tenn. Bd. of Paroles*, 125 S.W.3d 429 (Tenn. Ct. App. 2003). On January 4, 2005, the Board conducted a second hearing, again denied Appellant parole based upon the same statutory factor, and scheduled his next parole hearing for six years from that date, in January of 2011. On January 18, the chancery court vacated its prior order, citing a lack of authority to order a new parole hearing. The chancery court further instructed the parties to submit briefs, and it issued a writ of certiorari instructing the Board to file the administrative record of Mr. York’s 2001 parole hearing for consideration by the court.

In its final order, the chancery court found that the six-year deferral decision was not arbitrary under *Baldwin*, because the opportunity to review and decide whether Mr. York would be paroled was not withdrawn from future Board members. The chancery court found that Mr. York had been granted the relief to which he was entitled, effectively dismissing the petition for writ of certiorari. Mr. York filed a timely notice of appeal to this Court.

II. ISSUES PRESENTED

Appellant again alleges state and federal constitutional violations based upon his reliance upon previously existing statutes and regulations, which have since been superceded, governing the parole procedures in this state. Mr. York alleges that the application of the currently existing

statutory and regulatory scheme denied him equal protection and due process and further constituted a violation of the Ex Post Facto Clause. The Board correctly notes that these arguments have already been addressed and rejected by this Court in the previous appeal of this case, *York*, 2004 WL 305791, at *2-3 (Tenn. Ct. App. Feb. 17, 2004).

Appellant additionally argues that constitutional violations occurred as a result of the Board's denial of parole in his case based solely upon the "seriousness of the crime" as set forth at Tenn. Code Ann. § 40-35-503(b)(2). We similarly rejected these assertions by Mr. York in the previous appeal of this case. *See York*, 2004 WL 305791, at *3. The Tennessee Supreme Court has held that the seriousness of the offense is a valid ground for denying parole in Tennessee. *Arnold v. Tenn. Bd. of Paroles*, 956 S.W.2d 478, 482-83 (Tenn. 1997).

Therefore, we limit our review to the remaining issue raised by Appellant, as we perceive it:

Whether the chancery court erred on remand when it dismissed Appellant's petition for writ of certiorari, after concluding that the Board's deferral of Appellant's next parole hearing for six years was not an arbitrary decision.

For the following reasons, we affirm the decision of the chancery court, as modified.

III. STANDARD OF REVIEW

In considering parole for prisoners, the Board is considered to be exercising a judicial function which is not reviewable if done in accordance with the law. *Robinson v. Traugher*, 13 S.W.3d 361, 363 (Tenn. Ct. App. 1999) (citing Tenn. Code Ann. § 40-28-115(c)). A limited form of review is available under the writ of certiorari to determine whether the Board has exceeded its jurisdiction, or has acted illegally, fraudulently or arbitrarily. *Id.* (citing *Powell v. Parole Eligibility Review Bd.*, 879 S.W.2d 871, 873 (Tenn. Ct. App. 1994)). The writ of certiorari is an extraordinary remedy whose issuance is within the discretion of the trial court. *Id.* at 364. This Court will not reverse a denial of the writ unless the trial court has clearly abused its discretion. *Id.*

IV. DISCUSSION

In *Baldwin v. Tenn. Bd. of Paroles*, 125 S.W.3d 429, 433-35 (Tenn. Ct. App. 2003), this Court addressed the action of the Board in postponing an appealing prisoner's parole consideration for twenty years:

We note that the seven Board members are appointed for staggered six year terms, after which they are eligible for (but not necessarily entitled to) reappointment. Tenn. Code Ann. § 40-28-103(c). Thus the effect of the twenty-year deferral is not only to preclude reconsideration of Mr. Baldwin's case by the members of the panel that declined to parole him, or by the other members of the

current Board, but also to prevent the members of the Board that may be sitting in the years 2005, 2010, 2015, or 2020 from even making an initial consideration of whether Mr. Baldwin could be a suitable candidate for parole. Under the panel's ruling, it is possible that the entire membership of the Board can completely turn over more than once before his case comes up for decision once again.

It appears to us that the Board's decision constitutes an arbitrary withdrawal of the power to parole from future Board members, and that a twenty-year deferral would undermine the very provisions of the parole statutes that empower the Board to grant parole. In addition, the essential effect of the Board's action is to change Mr. Baldwin's sentence to life without parole, contrary to what the Legislature intended. We think Mr. Baldwin has stated a cause of action which entitles him to the writ of certiorari. Therefore, we reverse the chancellor's order dismissing his claim that the Board acted arbitrarily in deferring the next consideration of parole for him for twenty years.

Baldwin, 125 S.W.3d at 434-35 (emphasis added).

In the first appeal of the case at bar, relying upon *Baldwin*, we expressed similar concerns with the Board's decision to defer parole consideration of Appellant for ten years, until July of 2011:

All one has to do is substitute ten years for twenty years and we have the same situation relative to its application to Mr. York. As in *Dyer*, nothing prohibits the Board of Paroles from, again, denying parole if such would depreciate the seriousness of the crime of which Mr. York stands convicted. Such a determination is within the sound discretion of the Board and not a matter for judicial intervention. Appellant has served more than a quarter of a century of his sentence and is now eligible for parole consideration. To again reject his application is one thing, but to postpone a review of his application for a decade is, while less arbitrary than in *Baldwin*, still an arbitrary decision. As to this issue, Mr. York is entitled to the writ of certiorari.

Since *Baldwin* post-dated the appeal in this case, this issue was not before the trial court, and, as a general rule, an issue not presented to the trial court will not be considered by this Court. . . . However, under Tennessee Rule of Appellate Procedure 13(b) and 36(a), we may consider such issues in the interest of fairness and justice. . . .

The Order of the trial court denying parole to Appellant, insofar as it dismisses the Petition on the merits of the hearing before

the Parole Board of July 3, 2001, is affirmed. The action of the Board, however, in deferring the next consideration of parole for a period of ten years is reversed, and the cause is remanded to the Chancery Court of Davidson County for further proceedings consistent with this opinion. Costs on appeal are taxed to the Tennessee Board of Paroles.

York, 2004 WL 305791, at *4 (citations omitted) (emphasis added).

In *Berleue v. Tenn. Bd. of Prob. & Parole*, No. M2005-00363-COA-R3-CV, 2006 Tenn. App. LEXIS 378 (Tenn. Ct. App. June 5, 2006), this Court upheld the chancery court's denial of a writ of certiorari petitioned for by a prisoner who was denied parole based upon the seriousness of his offense. In addition to similar constitutional arguments as those originally pursued by Mr. York and rejected by this Court in the first appeal of the present case, the prisoner in *Berleue* argued that the parole board's decision to defer his next parole hearing for five years was arbitrary. *Berleue*, 2006 Tenn. App. LEXIS 378, at *10-11. We cited both *Baldwin* and *York* as relevant holdings in this regard, and concluded that the five-year deferral period was not arbitrary:

In this case, the Board set Berleue's hearing date five years after his initial hearing. Applying the same rationale that we utilized in *Baldwin*, we cannot say that a five year lapse between parole hearings was arbitrary. Here, one or more Board members that considered Berleue's first parole hearing could reconsider his next parole request. Further, a lapse of five years would not preclude subsequent Board members from hearing Berleue's petition. Given the serious nature of the offense Berleue committed, his sentence of life in prison with the possibility of parole, and the fact that he had already served twenty-two years at the time of the hearing, an addition of five years would not have the effect of changing his sentence to a life sentence without parole. Given the facts in this case, a five year lapse between hearing dates does not undermine the parole statutes or the Board's power to parole. Thus, we conclude that, under these circumstances, a five year lapse between parole hearings was not arbitrary. . . Accordingly, we affirm the portion of the chancery court's decision finding that the Board acted properly in deferring Berleue's next parole hearing five years after his initial hearing.

Berleue, 2006 Tenn. App. LEXIS 378, at *12 (footnote omitted).

In the present case, on remand, the chancery court ordered the Board to hold "a parole hearing that will establish a deferral date meeting the guidelines provided by the Court of Appeals in this matter and *Baldwin*." The Board apparently held this second parole hearing on January 4, 2005. After this hearing, the Board again denied Appellant parole for the same reasons as previously

discussed, but this time deferred future parole consideration until January of 2011, six years from the date of this second hearing.

On January 18, 2005, the chancery court vacated the November order pursuant to Tennessee Rule of Civil Procedure 60.01, stating that it did not “have authority to order a new parole hearing.”¹ The chancery court granted a writ of certiorari requiring Appellee to file the administrative record from Mr. York’s 2001 parole hearing. The court also instructed the parties to “brief this complex issue after the record is received” The administrative record from the 2001 parole hearing was filed on March 21, 2005. On June 7, 2005, the chancery court entered a final order in which it stated in part:

Following the Court of Appeals remand, this Court returned Petitioner’s case to the Board for a parole hearing that would establish a deferral date meeting the guidelines provided by the Court of Appeals in this matter and Baldwin.[] In January 2005 the Court vacated this previous November 2004 order, issued the writ of certiorari and requested briefs. The November 2004 order was vacated because the Court concluded there could be a remedy without a full hearing. A second parole hearing, in response to the November 2004 order, had however, already taken place.

The Court has reviewed the 2001 administrative record of the 2001 parole hearing and the parties’ memoranda. *It is undisputed that the Board complied with the November 2004 order and conducted a second parole hearing on January 4, 2005. It is undisputed that, as a result of that hearing, because of the seriousness of the Petitioner’s crimes—two first-degree murder convictions for which he received two life sentences—the Board declined parole and scheduled the Petitioner’s next review in six years, January 2011.*

The Court finds that the Petitioner’s six-year parole hearing deferral fulfills the spirit and the letter of Baldwin. Parole Board members’ appointments are for six-year terms made on a staggered schedule so that the Board consists of new and experienced members. As the Baldwin court noted, “the seven Board members are appointed for staggered six-year terms, after which they are eligible for (but not

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The chancery court additionally stated:

Pursuant to Tenn. R. Civ. [P.] R. 60, after careful review of the Court’s power to act upon common law writ of certiorari, the decision of November 2, 2004 is vacated for the purpose of correction and so that erroneous precedent is avoided. It is not within the Court’s power to direct a particular remedy. Further, the writ had not been issued so as to allow the record to be received.

necessarily entitled to) reappointment.” Baldwin, 125 S.W.3d at 434. Tenn. Code Ann. § 40-28-103(b) states:

In the initial appointments made under this section, the speaker of the senate and the speaker of the house of representatives shall jointly appoint one (1) member to a term expiring on January 1, 1986. The governor shall appoint two (2) members to terms expiring on January 1, 1984, and two (2) members to terms expiring on January 1, 1982. On June 2, 1989, the governor shall appoint two additional members to terms expiring on January 1, 1992. Thereafter, all members shall serve six-year terms and shall be eligible for reappointment.

In Petitioner’s case, some Board members at the January 2005 hearing will again review his status for parole in 2011. The opportunity to review and decide whether the Petitioner will be paroled is not withdrawn from future Board members.

The six-year deferral based upon the seriousness of the crimes committed by Petitioner is not arbitrary or capricious. The Petitioner has been granted the relief for which he is entitled. The Respondent is taxed with the court costs.

(footnote omitted) (emphasis added).

The chancery court found that, as a result of this *second* hearing, the Board denied Appellant parole based upon the seriousness of the offense. Yet the chancery court found that a full hearing on this matter had been unnecessary. In the first appeal of this case, in *York*, 2004 WL 305791, at *5, we affirmed the Board’s decision to deny Appellant parole based upon seriousness of the offense, but reversed and remanded solely in order for the chancery court to address the deferral time period issue. Therefore, it is unclear why the chancery court ordered that a second hearing be conducted by the Board on remand. Since this Court had already affirmed the initial decision to deny Appellant parole based upon the applicable statutory factor, the second parole hearing was unnecessary to the extent that it exceeded the limited scope of our instructions on remand.

The chancery court recognized that the Board deferred another parole hearing of Mr. York until January of 2011, six years after this second hearing, and the court held that the “six-year parole hearing deferral fulfill[ed] the spirit and the letter of *Baldwin*.” We note that this date is a mere six months earlier than the one established by the 2001 decision of the Board originally setting the next parole consideration date as July of 2011. As already discussed, in *York*, 2004 WL 305791, at *4, this Court held that the ten-year deferral from the date of the July 2001 parole hearing was arbitrary under *Baldwin*.

Upon thorough consideration of the record before this Court, as well as the *Baldwin* and *Berleue* decisions and our previous opinion in this case, we find no abuse of discretion in the chancery court's conclusion that the Board's six-year deferral of parole consideration for Appellant was not an arbitrary decision, given the staggered six-year appointments of Board members. As in *Berleue*, here, one or more Board members that considered Appellant's first parole hearing could reconsider his next parole request. Furthermore, we do not believe that the essential effect of a six-year deferral period is to change Mr. Baldwin's sentence to life without parole, as was found to be the case for a twenty-year deferral period in *Baldwin*. To the extent that the chancery court found the six-year deferral period to be valid in this case, we affirm the judgment below.

However, we disagree with the Board's decision to run this six-year period from the date of the second parole hearing, which was conducted over three years later and deemed ultimately unnecessary by the chancery court. Relying on the transcript from the first parole hearing in July of 2001, the chancery court explicitly recognized that a second full hearing had not been required, yet it nonetheless upheld the Board's decision to run the six-year deferral period from the date of this second hearing. Since the chancery court explicitly acknowledged that "there could be a remedy without a full hearing," it is unclear what rationale the chancery court employed to impose an otherwise valid deferral time period from the date of the second hearing and to the detriment of Appellant. We therefore modify the order of the chancery court to reflect a deferral period of six years to run from the time of Appellant's initial parole hearing, which was held in July of 2001.

V. CONCLUSION

As a result of Appellant's first parole hearing in July of 2001, the Board validly denied Appellant parole based upon the finding that "[t]he release from custody at the time would depreciate the seriousness of the crime of which the defendant stands convicted or promote disrespect for the law" as set forth at Tenn. Code Ann. § 40-35-503(b)(2). After remand by this Court on the issue of the deferral period, in June of 2005, the chancery court appropriately denied Mr. York further relief under his petition for writ of certiorari based on its conclusion that the Board's election for a six-year deferral period was not an arbitrary decision. However, this six-year deferral period for Mr. York's next parole hearing should not have been imposed from the date of the second parole hearing in January of 2005, but from the date of the first parole hearing in July of 2001. We therefore modify the order of the chancery court to reflect this decision, and affirm the judgment of the chancery court as modified. Costs on appeal are taxed to the Appellant, William W. York, for which execution may issue if necessary.

ALAN E. HIGHERS, JUDGE